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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-748

AMERICAN RADIO ASSOCIATION, AFL-CIO, et al.,
Petitioners,

versus

MOBILE STEAMSHIP ASSOCIATION, INC. and ROBERT E. MALONE,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF FOR RESPONDENT ROBERT E. MALONE

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INDEX

Page

Opinions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions Involved .. 2

Questions Presented 3

Statement of the Case 4

Argument

I. The Alabama State Court Had Jurisdiction To Enjoin Petitioners' Picketing Of Foreign-Flag Vessels In Mobile And Was Not Pre-empted From Doing So By The NLRA 16

II. Petitioners' Picketing Is Not Constitutionally Protected And Was Properly Enjoined 20

Conclusion 32

TABLE OF AUTHORITIES

CASES:

Adderly v. Florida, 385 U.S. 39 ..... 23, 30

American Radio Association, et als v. Mobile Steamship Association, 483 F.2d 1 15

Baggett Transportation Co. v. Local No. 261, etc. 259 Ala. 19, 65 So.2d 506 26

Bakery & P. Drivers & Helpers v. Wohl, 315 U.S. 769 ..... 22, 23

Benz v. Compania Naviera Hildago, 353 U.S. 138 ..... 16, 17, 20

Cameron v. Johnson, 390 U.S. 611 23

Carpenter's & Joiners Union of America v. Ritter's Cafe, 315 U.S. 722 31

TABLE OF AUTHORITIES (Continued)

Page

Carter v. Knapp Motor Co., 243 Ala. 600, 11 So.2d 383 27

Cox v. Louisiana, 379 U.S. 559 ..... 23, 30

Cox v. New Hampshire, 312 U.S. 569 23

Duplex Printing Press Co. v. Deering, 254 U.S. 443 30

Food Employees v. Logan Valley Plaza, 391 U.S. 308 ..... 22, 23, 31

Fruit Dispatch Co. v. NMU, La. App., 138 So.2d 853 ..... 19, 29

Giboney v. Empire Storage and Ice Co., 336 U.S. 490 22

Grain Elevator Workers Local 418 v. NLRB, (D.C.Cir.) 376 F.2d 774 18

Hughes v. Superior Court of California, 399 U.S. 460 ..... 22, 23

Incres Steamship Co. v. International Maritime Workers Union, 372 U.S. 24 18

International Brotherhood v. Vogt, 354 U.S. 284 ..... 21, 23, 31

International Longshoremen's Local 1416 v. Ariadne Shipping Co., 397 U.S. 195 16

Loftin v. Parker, 253 Ala. 98, 42 So. 2d 824 20

Local No. 612, International Brotherhood of Teamsters v. Bowman Transportation, Inc., 276 Ala. 563, 165 So. 2d 113 26

TABLE OF AUTHORITIES (Continued)

Page

Local 761 v. NLRB, 366 U.S. 667 26

Madden v. Grain Elevator Workers Local 418, 334 F.2d 1014 18

McCulloch v. Sociedad Nacional, etc., 372 U.S. 10 .. 18, 20

Pennington v. Birmingham Baseball Club, Inc., 277 Ala. 336, 170 So.2d 410 28

Russell v. International Union, etc., 258 Ala. 615, 64 So.2d 384 26

Sparks v. McCrary, 156 Ala. 382, 47 So. 332 27

Teamsters Local 309 v. Hanke, 339 U.S. 470 32

Thornhill v. Alabama, 310 U.S. 88 ..... 23, 30

Traux v. Corrigan, 257 U.S. 312 30

Windward Shipping, etc., et al. v. American Radio Association, etc., et al., ____ U.S. ____, 94 S.Ct. 959, 39 L. Ed. 2d 195 .. 16, 17, 18, 19, 20

CONSTITUTION & STATUTES:

Labor Management Relations Act, as amended, 29 U.S.C. Sec. 141-187 2

Section 6 of Article 1 of the Constitution of Alabama 3, 26

Section 13 of Article 1 of the Constitution of Alabama 3

Fifth Amendment to the U.S. Constitution 2, 30

Title 38, Sec. 1(19), Code of Alabama (1958) 30

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BRIEF FOR RESPONDENT ROBERT E. MALONE

OPINIONS BELOW

The opinion of the Supreme Court of Alabama dated May 3, 1973, affirming the granting of a temporary injunction by the Circuit Court of Mobile County, Alabama is reported at 279 So.2d 467, and is set forth at pages 5a-26a of Single Appendix. The denial by the Supreme Court of Alabama of petitioners' application for rehearing, dated July 5, 1973, is found at page 27a. The injunctive order of the Circuit Court of Mobile County, Alabama, dated November 11, 1971, is found at pages 28a-30a.

JURISDICTION

The jurisdiction of this Court is stated by petitioners to rest on 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant part of the Fifth Amendment to the U.S. Constitution is, as follows:

> "No person shall be ... deprived of life, liberty or property, without due process of law..."

Labor Management Relations Act, as amended, 29 U.S.C. Sec. 141-187.

> "The state, in engaging in the work of internal improvement, or promoting, developing, constructing, maintaining, and operating habors, seaports and riverports within the state and its jurisdiction, acting through the department, shall have power to acquire, purchase, install, lease, construct, own, hold, maintain, equip, use, control and operate, at seaports, or at any ports located on any river or stream which is navigable for commercial traffic, or which may be made so navigable at any time in the future, wharves, piers, docks, quays, grain elevators, cotton compresses, warehouses and other water and rail terminals and other struc-

tures and facilities needful for the convenient use of the same in the aid of commerce...."

The pertinent part of Section 6 of Article 1 of the Constitution of Alabama, is as follows:

"...and he shall not be compelled to give evidence against himself, nor be deprived of life, liberty, or property, except by due process of law..." Ala. Code, Tit. 1 (1958), p.36.

Section 13 [redacted] Constitutional Article 1, is, as follows:

"That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay." Ala. Code, Tit. 1 (1958), p.69.

QUESTIONS PRESENTED

Petitioners, maritime unions, picketed every foreign flag vessel in the Port of Mobile, protesting low wages and benefits paid crewmen aboard such vessels. Such picketing started soon after a Federal Judge had ordered back to work longshoremen members of a union affiliated with petitioners, the I.L.A., and at a time when harvesting of soybeans for export sale was at its height. Members of the I.L.A. refused to cross the picket lines set up by petitioners to load or discharge such foreign flag vessels, thereby shutting down the

entire Port and depriving respondent Malone and other farmers from harvesting and delivering their beans to the only available public export elevator. Respondent steamship members were also prevented from performing their agreements with such vessel owners to load and discharge such vessels. Petitioners appealed from the State Court order sought and obtained by respondents enjoining such picketing. The questions presented are:

1. Whether the State Court was correct in concluding that it had jurisdiction to hear the lawsuit to enjoin picketing by petitioners, American unions in a labor dispute with foreign-owned, foreign-flag ships manned by foreign crews represented by foreign unions.

2. Whether the State Court, upon finding that the picketing by petitioners has as one of its purposes unlawfully interferring with the rights of others to engage in a lawful occupation was against such state policy in a domain open to state regulation, violated petitioners' First and Fourteenth Amendments rights by granting a temporary injunction restraining said picketing which effectively shut down the Port of Mobile.

STATEMENT OF THE CASE

Petitioners' brief is so replete with omissions regarding a critical issue - the real intent, purpose and result of the pickets, as to require this respondent to present a Statement of the Case.

The Parties:

Petitioners are American maritime unions representing a substantial majority of American merchant seamen.

Petitioner Louis Neira is petitioner SIU's Port Agent and the person selected by petitioners' joint committee (92a) to put out the pickets in Mobile, give them instructions, in cooperation with the other union petitioners (142a-143a). Petitioner Master, Mates and Pilots is a division of the International Longshoreman's Association ("ILA").

Respondent Mobile Steamship Association is a nonprofit corporation composed of members who are in the shipping business in the Port of Mobile, Alabama (67a). Included in its membership are stevedoring companies and agents representing steamship companies, foreign and U.S., whose vessels call at the Port. Respondent Robert E. Malone is a farmer who grows soybeans on rented land near Wilmer (Mobile County), Alabama (79a).

The Port of Mobile:

This Port is Alabama's only deep-water port. The Alabama State Docks Department ("Docks") owns and operates wharves, warehouses and a grain elevator for the use and benefit of the public. The Docks' grain elevator is the only public elevator in the area where farmers such as Malone can deliver and store their soybeans for export (77a, 79a-80a). Such elevator serves also as the only storage facility for soybeans

grown for export in South Alabama, Northwest Florida, East and Southeast Mississippi (44a).

On November 3, 1971, the Port of Mobile had at the Docks the following vessels (and their flag of registry): ILKON TAK (Liberian), AQUA GLORY (Liberian), BEL HUDSON (English) and PRESIDENT QUEZON (Phillipines) (96a).

The Picketing:

September 30, 1971, was the expiration date of the agreement between one of the petitioners' affiliated unions, the ILA and the employer bargaining agent, respondent Mobile Steamship Association. On October 1, 1971, the ILA commenced its strike against the Steamship Association. At this time, one of the foreign owned vessels in the Port was the BEL HUDSON, which arrived on October 1, 1971, under the elevator spouts at the Alabama State Docks ("Docks") ready to receive a cargo of soybeans (79a).

At the time of the ILA strike, soybean farmers in South Alabama, East and Southeast Mississippi and Northwest Florida had started to harvest their crops of beans to be sold and delivered at the Docks elevator, for export.

Strikes were also called in other Gulf ports by the ILA, but with less success than the efforts in Mobile. In Texas, the ports never stopped operating, as local ILA leaders refused to follow strike orders issued from the ILA International Headquarters in New York. In Louisiana, the National Labor Relations Board

("NLRB") secured an injunction under Sec. 10(1) of the National Labor Relations Act, compelling the longshoremen to return to work in the Port of New Orleans. At one point the Port of Mobile was the only major port on the Gulf Coast that was not working.

On November 3, 1971, the NLRB initiated efforts to secure a restraining order in the Port of Mobile pursuant to Sec.10(1) of the NLRA. At approximately 12:00 Noon on November 3, 1971, the Federal District Court in Mobile advised the parties that the temporary restraining order prayed for by the NLRB would issue against all ILA locals in the Port of Mobile (69a).

Almost simultaneously with the Federal Court's decision to enter the temporary restraining order, at about 12:10 p.m. on November 3rd, petitioners established a picket line at all gates of the Alabama State Docks, where vessels were berthed, (69a). These pickets were located at "every conceivable land surface entrance to the Alabama State Docks" until November 5, the day the State Court injunction suit was filed by respondent Steamship Association (testimony of Mr. Niera, 132a). On November 3rd, the Port of Mobile had at the Docks the following vessels all of which were foreign-flag: ILKON TAK, AQUA GLORY, BEL HUDSON, and PRESIDENT QUEZON, (96a). Petitioners' so-called "informational pickets" at all entrances to the Docks were directed against all of the vessels in port, as the same are named above (81a, 123a-124a). The ILA refused to cross petitioners' picket lines (117a), shutting down the whole port.

On November 5th, when the State Court injunction suit was filed, the situsof this picketing was shifted to the berths of two ofsuch foreign-flag vessels, the ILKON TAK and the AQUA GLORY, although the petitioners had instructionsto picket *all* foreign vessels in the Port. (Testimonyof Mr. Niera, 123a-126a). Mr. Niera testified that 70-8% of the vessels that call at the Port of Mobile are oreign flag (126a). These "informational" pickets directed to the "public" of petitioners' plight were placed at the sides of the ILKON TAK and the AQUA GLORY berths at an almost deserted State Docks, far way from the public eye. The AQUA GLORY had called at the Port of Mobile 3 times in the 6 months prior to the ILA strike, and none of the petitioners had attempted to picket her, and witness Macpherson furthe testified that in the past 13 years he had been in the steamship business in Mobile, none of petitioners had ever posted any informational pickets until the then present time (71a).

Longshoremen and oter of respondent Steamship Association's employeesrepresented by locals of the ILA refused to cross petioners' picket lines or to perform work or services icident to the loading and/or discharge of vessels inthe Port (61-75a). Thus, the picketing prevented the teamship Association and its members from performig its contract to load and unload the foreign-flag vesels picketed, and brought to a halt all business operations having to do with the loading and unloading of essels.

It is uncontroverted that until enjoined by the Alabama Trial Court, petitoners' pickets had shut down the Port of Mobile.

The Intent, Purpose of the Picketing:

Although the unions claim that their picketing was purely for the purpose of informing the American public of the plight of American seamen who had lost job opportunities to foreign seamen crewing foreign flag vessels, the following testimony of petitioners' only live witness, Mr. Niera, revealed the true purpose, intent and calculated result of such pickets:

(125a - 126a)

"Q. Now Mr. Niera, are you familiar with the type flag vessels that call at the Port of Mobile?

A. Oh yes.

Q. What percentage of the vessels that call here at the Port are of foreign flags?

A. I would say about 70 to 80 percent.

Q. Yes sir. And it is your instructions from your international headquarters to picket 70 or 80 percent of the vessels that call at the Port of Mobile?

A. Within my resources, yes, to picket every one.

Q. And you would assume, as a man knowledgeable in the field of labor picketing that good labor men and good union men would not cross those picket lines?

A. We were hoping that they wouldn't do that.

Q. Yes sir. And this hope has been fulfilled in the Port of Mobile as far as longshore-

men are concerned, isn't that true?

A. Well, to a point, yes.

Q. Now, would it not be then a fair conclusion to say that you had hoped and do hope that you will be able to prevent 70 or 80 percent of the vessels in the Port of Mobile from loading or unloading cargo?

A. My hope is to clutter up the Port of Mobile with foreign ships - Liberian, Panamanian ships - to bring sufficient pressure on the United States Government to do something about the American Merchant Marine.

Q. That is your intention?

A. Yes sir.

Q. That is your purpose?

A. Yes sir."

(130a)

"Q. ...You realize that your picketing is preventing members of the Association from loading and unloading these vessels that you are picketing?

A. I hope that my picket line will shut the whole State Docks down and let everybody go home for a while. I hope I can do that. Not just the Mobile Steamship Association."

(143-144a)

"Q. Alright sir. Now, when you told these pickets to carry this sign that said 'don't patronize this vessel' -

A. Oh yes very polite.
Q. What did you mean by patronize?
A. The only sense that I can understand 'patronize', don't do nothing for it.
Q. Don't do any business?
A. That's right.
Q. Well you hope the longshoremen read the picket signs, don't you?
A. I hope everybody does.
Q. Yes sir. Including longshoremen?
A. Including longshoremen. Including Mobile Steamship Association."

(140a)

"Q. Mr. Niera, you are trying to prevent the AQUA GLORY's last remaining cargo from being discharged and her being used to carry a cargo of grain (soybeans), aren't you?
A. Yes."

(138a)

"Q. At the tipple? You didn't want to get dirty?
A. Right. We don't want our pickets to get dirty, so we put them about a hundred feet from the vessel.
Q. But the crew from the AQUA GLORY that you all didn't want to get dirty would pass by your signs?
A. Oh, yeah, coming and going.
Q. Right. And you wanted them to see your signs, didn't you?

A. Well, that's what we were there for.

Q. Right. And you want these crews on these foreign flag vessels to react against these foreign flag owners and make those owners raise those wages of those crews, don't you?

A. That would be nice."

(139a)

"Q. All right, sir. But if these men benefit from this on these foreign vessels and go to their owner and make their owner raise their wages to the point where those owners have to pay equivalent wages to the American seamen, that's what you want, isn't it, Mr. Neira?

A. Yes sir."

Results of Picketing:

As a result of the work stoppages induced by the picketing in question, ireparable injuries were being sustained by the respondent Steamship Association, its members and the Port of Mobile. Member companies of the Steamship Association were losing in excess of $15,000.00 per day in fixed overhead costs. Vessel demurrage costs were ranging from $2,000.00 to $5,000.00 per day, per vessel. Ocean freight revenues were being lost at the rate of $35,000.00 per vessel, per day. The loss to the economy of the City of Mobile resulting from the work stoppage was estimated to be in excess of $3,300,000.00 per week. Other forms of transportation, such as rail, barge, and truck lines which would have normally moved cargo in or out of the Port area

were idled with resulting losses. Inland manufacturing plants were suffering the necessity of curtailing production and laying off personnel, all as a result of the inability of these plants to export their products and/or import raw materials used in the manufacturing process (73a-75a). One Liberian Flag vessel loaded with steel was anchored outside of the Port of Mobile, but would not come in, due to petitioners' shutting the Port down (84-85a).

In addition to the dock workers directly involved in the work stoppages at the Port, a large number of other employees directly connected with the industry were furloughed or laid off as a result of the strike. The Docks facilities of the State of Alabama which consisted of all of the wharves in the Port of Mobile with a cost value in excess of $50,000,000.00, were idle with resulting losses of revenues. Cargo normally shipped through the Port and vessels which normally call at the Port of Mobile had been diverted to other Ports. Foreign shippers were substituting other world markets for their sales and purchases because of the strike, and past experience indicated that a large percentage of that diverted would not revert to the Port of Mobile (74a-75a).

The result of the picketing by petitioners, if it had been allowed to continue, would have been disastrous. Millions of dollars worth of soybeans (approximately 13 million bushels having an estimated value of 50 million dollars) well past the time they should have been harvested, would have been lost, with resulting loss to the community and to the farmers had the Petition-

ers been allowed to continue their announced purpose of picketing all foreign vessels in the Port. Although the unions eventually shifted the pickets to foreign-flag vessels which were not located at the grain elevator, it was the stated purpose of the picketing to close up the entire Port of Mobile and to stop all foreign-flag vessels from operating at that Port (126a-129a), *and at a time when the only vessels in Port were those of foreign-flag.* Moreover, one of the vessels being picketed (the SS AQUA GLORY) and, thus, being prevented from unloading, was scheduled to load soybeans after her ore cargo was discharged.

Not only were the soybean cargoes in jeopardy, the reputation of the Port and the economic interests of the community and members of the Steamship Association were threatened.

The magnitude of the crisis facing the Port of Mobile, and, indeed, the State of Alabama at the time the preliminary injunction was sought and granted is apparent from the record.

The Litigation:

The above are the facts that were heard by the Trial Judge in the State Court on the original complaint of respondent Steamship Association, filed on November 5, 1971, the intervening complaint of respondent Malone, the answer to the original complaint, and the affidavits and testimony of witnesses in open Court. (The State Court had refused respondents' request for an *ex parte* injunction, and set the matter down for trial on November 10, 1971).

With respect to the State Court injunction order not complained of by petitioners until approximately 1 year after it was issued, if petitioners considered that such order was vague in not being sufficiently precise to advise them of what they did wrong, the record is void of any effort to: request more definitive findings; request that the case be set down for trial on the merits; or any motion to dissolve or modify the temporary injunction. If petitioners considered that they were wrongfully enjoined and were suffering immediate and irreparable damage, it is incomprehensible why they did not immediately use the available prompt review procedure (to the Alabama Supreme Court). Instead of seeking prompt redress for any claimed wrongs, the transcript of the State Court proceeding is replete with requests for delays in taking an appeal to the State Supreme Court (6 requests totalling about 1 year to extend time to file a transcript which could not have taken over 2 days to prepare (IIa)). Ultimately, after argument and taking the case under submission, on May 3, 1973, the Alabama Supreme Court affirmed the issuance of the temporary injunction (5a-26a).

Petitioners attempted to have enjoined the State Court's injunctive order in the U.S. District Court for the Southern District of Alabama, and the 5th Circuit Court of Appeals held that the Federal Trial Judge did not abuse his discretion in refusing petitioners' requested relief, *American Radio Association, et als v. Mobile Steamship Association,* 483 F.2d 1 (1973).

ARGUMENT

I.

The Alabama State Court Had Jurisdiction To Enjoin Petitioners' Picketing Of Foreign-Flag Vessels In Mobile And Was Not Preempted From Doing So By The NLRA

In October of 1971, shortly prior to petitioners' setting up pickets in Mobile, using the same methods, picket signs and literature as were used in the case at bar, petitioners picketed 2 foreign-flag vessels in the Port of Houston. The Texas Trial Court declined to enjoin such picketing, on the grounds that it was preempted of jurisdiction by the NLRA. The Texas Court of Appeals affirmed. Upon review, this Court, in *Windward Shipping, etc., et al. v. American Radio Association, etc., et al.*, 94 S. Ct. 959, 39 L. Ed 2d 195, reversed the Texas appellate decision, holding that, absent a clear congressional interest that the NLRB should inject itself into and interfere with the maritime operations of foreign vessels, the rationale of *Benz*,[1] rather than *Ariadne*[2] controlled.

Petitioners argue that, somehow, because respondents' complaint contained allegations of how petitioners' picketing were affecting them, respondents are relegated to the NLRB as their only forum. This argument is totally without foundation. It ignores the plain

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[1] *Benz v. Compania Naviera Hildago*, 353 U.S. 138.
[2] *International Longshoremen's Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195.

fact that such allegations complained of the picketing activity (directed at foreign-flag vessels) (36a-37a), setting forth in detail what the signs and leaflets said (36a). The results averred in the complaints (37a-38a, 46a-48a) are identical to those complained of in all the cases from *Benz* to *Windward* — the longshoremen refused to touch the vessels being picketed. Petitioners' argument ignores also the proof and the purposes of the picketing, coming out of the mouth of its own witness, Mr. Neira:

(138a)

"Q. At the tipple? You didn't want to get dirty?

A. Right. We don't want out pickets to get dirty, so we put them down about a hundred feet from the vessel.

Q. But the crew from the AQUA GLORY that you all didn't want to get dirty would pass by your signs?

A. Oh yeah, coming and going.

Q. Right. And you wanted them to see you signs, didn't you?

A. Well, that's what we were there for.

Q. Right. And you want these crews on these foreign flag vessels to react against these foreign flag owners and make those owners raise those wages of those crews, don't you?

A. That would be nice."

(139a)

"Q. All right sir. But if these men benefit from this on these foreign vessels and go to their owner and make their owner raise their wages to the point where those owners have to pay equivalent wages to the American seaman, that's what you want, isn't it, Mr. Neira?

A. Yes sir."[3]

This Court has always been concerned with determining what the unions were doing, and not the identity of the complaining party, *Incres Steamship Co. v. International Maritime Workers Union*, 372 U.S. 24, 27-28; *McCulloch v. Sociedad Nacional, etc.*, 372 U.S. 10.

Petitioners cite *Madden v. Grain Elevator Workers Local 418*, 334 F.2d 1014 (7 Cir.) and *Grain Elevator Workers Local 418 v. NLRB* (D.C.Cir.) 376 F.2d 774 as support for the contention that the NLRB is respondents' sole forum. Again, these cases do not support such contention, even if this Court's decisions in *Benz*, *McCulloch* and *Windward* were totally ignored. In both *Madden* (at p. 1019) and *NLRB* (at p.776), the Courts of Appeals were careful to note that the injunctions secured by the NLRB did not: regulate the internal affairs of the Canadian-owned vessel, or create any conflict or disharmony between Canada and the U.S.; but, instead, involved only action by an American

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[3]*Cf.* with *Windward* decision at p. 202: ". . . At the very least, the picketers must have hoped to exert sufficient pressure so that foreign vessels would be forced to raise their operating costs to levels comparable to those of American shippers. . . ."

union against an American employer, and only employees working in a domestic plant of such American employer. In the case at bar, petitioners' efforts were directed at the owners of the foreign-flag vessels, and designed to stir up the alien crews of such vessels against such owners by demanding higher wages and more benefits.

Petitioners have cited no authority to the effect that parties such as respondent Malone, and the hundreds of farmers like him in adjoining States (to Alabama) who depended upon the Docks elevator for storage of their grain sold for export, or respondent Steamship Association members who act as steamship agents and stevedores handling foreign-flag vessels are not among *Windward's* "... citizenry of a country as dependent on goods carried in foreign bottoms as is ours... (p.202). In fact, the reverse is true, *Fruit Dispatch Co. v. NMU,* La. App., 138 So.2d 853 (1962), where plaintiff was consignee of cargo of perishable bananas.

Lastly, petitioners say *Windward* might not apply to the preemption issue to the case at bar if any of the foreign-flag vessels were owned by Americans. Firstly, what percent, if any, of stock of a vessel-owning corporation may be held by an American depends entirely upon the laws of the foreign-flag country; secondly, there is not the slightest hint in the record that any of the picketed foreign-flag vessels were owned, in whole or in part, directly or indirectly by an American citizen; and, thirdly, it would not make one particle of difference on the preemption issue if the

stock of the owning corporation of every vessel were owned by an American, *McCulloch, supra.*

Contrary to petitioners' contention that the Alabama Courts had gone "off the (constitutional) loom" (brief, p.23), the Alabama Courts were correct in deciding that jurisdiction was not preempted by NLRB, following *Benz,* now buttressed by *Windward.*

The method, purpose and result of such picketing fall squarely within the facts of *Windward* and *Benz,* which are clear authority that the NLRA does not, under the facts of the case at bar, preclude a State Court from asserting jurisdiction in a lawsuit to enjoin such picketing.

II.

Petitioners' Picketing Is Not Constitutionally Protected And Was Properly Enjoined

At the outset, it is to be noted that petitioners make frequent complaint that the State Trial Judge made no specific findings of fact, and the State Supreme Court engaged in rationalization and inference in affirming the lower Court. The trial judge was not, under Alabama law, compelled to enter specific findings of fact, *Loftin v. Parker,* 253 Ala. 98, 42 So.2d 824. However, petitioners never requested that the Court amplify its decree, nor was there ever filed any motion to stay, modify or dissolve the temporary injunction. When comment was solicited from counsel for petitioner by the trial judge, after announcing his decision, there was no objection, no request for any more defini-

tive findings (145a). In *International Brotherhood v. Vogt*, 354 U.S. 284 (pp.284-285), the trial Court refused to make the specific findings requested by counsel for the union. On appeal, the Wisconsin Supreme Court first reversed, then withdrew its opinion, and then affirmed, but on a totally different ground from that relied on by the trial Court. Such affirmance was based upon the Wisconsin Supreme Court's reviewing the evidence and drawing the inference that the picketing was for an unlawful purpose. *Vogt* (p.287-288) also refers to the *Stacy* case, where the Maine Supreme Court also drew its inference from the testimony. This Court reviewed the opinions of the Wisconsin and Maine Supreme Courts both based on inference, and the respective records and found no error in either. In the case at bar, the Alabama Supreme Court reviewed carefully the record and decree of the trial Court, and affirmed same. Being well aware of the evidence presented and the trial Court's decree entered, and making no effort to secure any more definitive findings, it is obvious that petitioners considered it more advantageous to their position to proceed on the record as it is now presented.

Picketing by an Organized Group is Free Speech, Plus, and is the Subject of Restrictive Regulation:

Petitioners assert that the pickets were doing no more than just asking the public to "Buy" or "Ship American" (brief p.21). If this were true, this party would never have been enjoined. Despite the fact that the evidence clearly demonstrated that the intent or purposes of the picketing were: to shut down the

Docks; force the foreign shipowner to pay its crew the equivalent of American seamen's wages; and nullify the rights of respondents to fulfill their contracts and make a living, petitioners come into this Court with the assumed posture that because of the First and Fourteenth Amendments, they "are given special constitutional protection denied all other people."[4] Neither the facts nor the law of this case supports any such position.

There is no question in this case but that the effect of the pickets was to shut down the Docks. Picketing is free speech, plus, the "plus" being physical activity that may implicate traffic and other matters, and the "plus" factor may be regulated.[5] The Constitution does not demand that the element of communication in picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent.[6] Picketing, although having an ingredient of communication, cannot dogmatically be equated with the constitutionality of protected free speech.[7]

The States Have the Right to Impose Reasonable Restraints Upon Picketing Activities as the Same May Affect the Rights of its Citizens and the Use of State Property:

Picketing is not beyond the control of a State if the manner in which picketing is conducted or the purpose

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[4]*Giboney v. Empire Storage and Ice Co.*, 336 U.S. 490, 496.
[5]*Food Employees v. Logan Valley Plaza*, 391 U.S. 308, 326.
[6]*Hughes v. Superior Court of California*, 399 U.S. 460, 464-465.
[7]*Bakery & P. Drivers & Helpers v. Wohl*, 315 U.S. 769, 776-777.

which it seeks to effectuate gives ground for its disallowance, *Hughes, supra*, pp. 465-466. A State is not required to tolerate in all places even peaceful picketing by an individual, *Wohl, supra.*, p.775. It is within the province of States to set the limits of permissible contest open to industrial combatants, and, indeed, it is the "power and the duty" of a State to "preserve the peace and to protect the privacy the lives and the property of its residents", *Thornhill v. Alabama,* 310 U.S. 88, 104-105. It makes no difference whether the State policy in this respect is expressed in its Constitution, its Legislature or its Courts, or whether the same is reflected in its civil or its criminal law, *Vogt, supra,* p.293. The States also have the right to impose regulation upon picketing where use of its property is concerned, *Logan Valley Plaza, supra,* pp.320-321; *Cameron v. Johnson,* 390 U.S. 611; *Cox v. Louisiana,* 379 U.S. 559; *Cox v. New Hampshire,* 312 U.S. 569; and *Adderly v. Florida,* 385 U.S. 39.

The Picketing Violated Respondents' Rights Under Alabama's Valid Law Against Unlawful Interference with Their Right to Engage in a Lawful Occupation, and Their Rights Under the Alabama Constitution, the Federal Constitution and the Federal Law:

Respondent Malone was not involved in any labor dispute, conflict or disagreement with any of the petitioners, respondent Steamship Association, or anyone else (134a-135a). Soybeans are perishable, and must be harvested when ready, or the beans will fall on the ground where they cannot be combined and picked up (78a). He, like so many other soybean farmers in

South Alabama, had no on-farm storage for beans, and had borrowed money against the crop, secured by a mortgage on his farm equipment (77a-80a). The only storage facility for farmers such as Malone growing crops in South Alabama, Northwest Florida and Southeast Mississippi who, like Malone, had agreed to sell their beans for export, was the Docks' elevator (44a). This elevator's limited capacity to handle a large crop of beans was such that there had to be a continuous flow of beans through the elevator and into the cargo holds of vessels, or the elevator becomes full and cannot receive any more beans (74a, 78a, 80a, 86a-87a). In fact, the delay in loading the BEL HUDSON with grain for over 1 month caused by the ILA and by petitioners' pickets had already put Malone in default on his farm equipment, note and mortgage (79a, 133a). On the evening before the trial, Mr. Malone had been in line for hours behind 70 other trucks waiting his turn to unload at the elevator. He summed up his plight, as follows (80a):

> "In other words, if the Alabama State Docks elevator can't store my beans, I can't sell the beans, they just stay in the field and rot."

Members of respondent Steamship Association had contracts with the owners of the picketed foreign-flag vessels to load and discharge same.

The "intent" and "purpose" of the pickets was stated unqualifiedly by Mr. Neira to "clutter up the Port of Mobile with foreign-flag vessels ... to bring sufficient pressure on the United States Government to do

something about the American Merchant Marine" (125a-126a). He also testified that a purpose was to keep the AQUA GLORY from being able to load a cargo of soybeans (140a); and to make the foreign shipowners raise the foreign crewmen's wages to equal those paid U.S. mariners (139a). The examination of Mr Neira was prefaced with the understanding that "your" meant all of the picketing petitioners (115a).

This harmful effect of his testimony to petitioners' cause is apparent by efforts reflected in petitioners' brief (p.25) to equate such testimony to the "vagrant" mutterings and personal observations of a "low level official". Mr. Neira was the Port Agent for the petitioner SIU for 12 years (106a). It was Mr. Neira who called the committee (of petitioners) and told them what the unions were going to do (108a-109a). It was also Mr. Neira who put out the pickets and instructed them in cooperation with other members of the committee (143a).

The impact of the pickets fulfilled the purpose and intent of same — the Port was shut down, since the ILA longshoremen would not cross the picket line.

The purpose and intent was not just a "hope", and the cases cited by petitioners on pages 26-27 on their brief do not apply.

Assuming, *arguendo*, that there is somehow some ambiguity about Mr. Neira's testimony as to intent and purpose of the pickets, in the absence of admissions by the union of an illegal intent, the nature of

acts performed shows the intent, *Local 761 v. NLRB*, 366 U.S. 667, 674. Such actions were: to picket every foreign-flag vessel in the Port (effectively shutting the Port down); the "Public" on the picket signs at an isolated, almost empty Docks could mean only the foreign crewmen aboard the picketed vessels and the ILA longshoremen who refused to cross the picket line; and, instead of seeking publicity through the news media and by word of mouth, pickets were instructed not to talk to anyone, including such media (114a). The timing was such that the pickets went up moments after a Mobile Federal Judge indicated his intent to sign a back-to-work order directed to a sister (to petitioners) union, the ILA.

What is the policy and law of Alabama to protect State property and the rights of its citizens? Section 13 of Article 1 of its Constitution charges Alabama with the duty of keeping its Courts open for the purpose of providing a remedy by due process of law for any injury to one's person, lands or goods, *Russell v. International Union, etc.*, 258 Ala. 615, 64 So. 2d 384. Section 6 of Article 1 of its Constitution guarantees a citizen that he shall not be deprived of his life, liberty or property without due process of law.

It is clear that while peaceful picketing, standing alone, is lawful and not to be enjoined, picketing still may be enjoined if it is done in an unlawful manner or for an unlawful purpose. *Local No. 612, International Brotherhood of Teamsters v. Bowman Transportation, Inc.*, 276 Ala. 563, 165 So.2d 113; *Baggett Transportation Co. v. Local 261, etc.*, 259 Ala. 19, 65 So.2d 506.

It is also clear, under Alabama law, that unlawful interference with one's right to conduct his business is a tort, and will be protected, if necessary, by injunction, *Carter v. Knapp Motor Co.*, 243 Ala. 600, 11 So.2d 383 where the Supreme Court stated at page 384:

> "Our decisions are to the effect that the right to conduct one's business without the wrongful interference of others is a valuable property right which will be protected, if necessary, by injunctive process. Bowen v. Morris, 219 Ala. 689, 123 So. 222. And the enjoyment of the good name and good will of a business is likewise a valuable property right subject to like protection. Bankers' Fire & Marine Ins. Co. v. Sloss, 229 Ala. 2€, 155 So. 371. One's employment, trade or calling is likewise a property right, and the wrongful interference therewith is an actionable wrong. United States Fidelity & Guaranty Co. v. Millonas, 206 Ala. 147, 89 So. 732, 29 A.L.R.520."

Also expressing Alabama's clear policy in this respect is *Sparks v. McCrary*, 156 Ala. 382, 47 So. 332, where the Court said at page 334:

> "In necessary consequence, an unlawful invasion of or interference with the pursuit or progress of one's trade, profession, or business is a wrong for which an action lies. Holt, C.J., in *Keeble v. Hickeringill*, 11 East, 574, thus states the doctrine: 'He that hinders another

> in his trade or livelihood is liable to an action for so hindering him' — though it must be that he intended the broad declaration to be subject to the qualification that the hindrance, the act or conduct so resulting, be wrongful, unlawful, and this, independent, as a general rule, of the motive or intent with which the hindrance was accomplished."

Alabama's policy against wrongful interference with the business of another is best illustrated by *Pennington v. Birmingham Baseball Club, Inc.*, 277 Ala. 336, 170 So.2d 410. Here, the operator of the Birmingham Barons sought to restrain picketing at the baseball field the Barons had leased. The picketing was being conducted by unions representing carpenters and workmen, and it occurred after non-union carpenters and workmen performed repairs on the stadium. Pickets were placed at or near the entrances to the baseball stadium on the occasion of each baseball game carrying signs stating: "This park remodeled by non-union labor." The effect of the picketing was to reduce attendance at the home games of the Barons.

The Alabama Circuit Court enjoined the unions' picketing, and the Supreme Court affirmed on the basis that the picketing was a wrongful interference with the business of the Birmingham Barons, stating at page 416:

> "It is out opinion that the averments of the bill show a wrongful interference with complainant's business.... The general objectives of

> picketing are well known. Clearly the purpose and effect of the picket line whereon signs were displayed by saying, 'this park remodeled by nonunion labor,' was to affect attendance at baseball games sponsored by complainant, with whom the respondents had no controversy, past or present. ... The picketing carried on by respondents was entirely punitive, since there was no controversy between respondents and the complainant concerning any facet of employer-employee relationship."

Alabama's policy prohibiting wrongful interference with the businesses of others has been recognized in other states. For example, Louisiana has upheld an injunction of picketing by a labor union in a situation strikingly akin to the one now presented. *Fruit Dispatch Co. v. National Maritime Union*, 138 So.2d 853 (La. App. 1962). In that case, the Louisiana Court of Appeals found the picketing of foreign-flag vessels to be beyond the jurisdiction of the NLRB and tortious under Louisiana law:

> "That the picketing is peaceful does not warrant its pursuit when it is illegal and tortious; illegal because its purpose is to interfere with and regulate the internal affairs and management of foreign vessels in violation of treaty rights and guarantees, and *tortious* because its immediate effect is to cause irreparable property and financial loss to the foreign ship owners and their foreign and *American business associates. Bakery & Pastry Drivers &*

Helpers Local 802 v. Wohl, 315 U.S. 769, 776-777, 62 S. Ct. 816, 86 L. Ed. 1178, cited with approval in *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 69 S. Ct. 684, 93 L. Ed. 834, 138 So. 2d at 856 (Emphasis added.).

Certainly, in addition to protecting its own citizens' rights, the State of Alabama had a valid interest in its policy, as owner and operator of the Docks system to keep the same open and available "for the convenient use of the same in the aid of commerce," as provided in Section 1(19), Title 38, Code of Alabama. This right should be no less than that accorded Florida with respect to jail ground property, *Adderly v. Florida, supra,* or Louisiana, with respect to courthouse grounds, *Cox v. Louisiana, supra.*

Federal decisions also recognize that a person's business or occupation is a property right not to be unlawfully interfered with, *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 465; *Traux v. Corrigan*, 257 U.S. 312, 327. Certainly, as to Malone's soybean crop, and other farmers in like predicament, there was the "clear and present danger of destruction of property" referred to in *Thornhill, supra,* at page 105. The U.S. Fifth Amendment also guarantees that no one's property shall be taken without due process of law.

It is perfectly obvious that petitioners violated these respondents' rights under Alabama and U.S. law to make a living when they effectively shut down the Port of Mobile, a purpose and result unlawful in and of itself. Their tortious behavior is compounded by petitioners' starting on their cause of conduct and movements after it became known that a sister union was

going to be put back to work by a Federal Judge. This was not *Logan Valley*, protected picketing as claimed by petitioners. In *Logan Valley*, only 1 store in a public shopping center was picketed, as distinguished from picketing and effectively closing down the entire shopping center; and this Court found neither purpose nor manner to interfere with the public use of such shopping center. In fact, petitioners' pickets were unlawful in violating *Logan Valley's* admonition (r 613) that the picketing be conducted in such a manner as to not "unduly interfere with the normal use of the public property by other members of the public with an equal right of access to it" — these respondents were shut off from any use whatsoever of public Docks' property.

The Alabama Court undoubtedly "balanced the competing interests" (the right of the element of communication in picketing against the power of the State to set the limits of conduct open to industrial combatants) *Vogt, supra, Teamsters Local 309 v. Hanke*, 339 U.S. 470; and *Carpenter's & Joiners Union of America v. Ritter's Cafe*, 315 U.S. 722, where this Court stated at pages 724-725:

> "The task of mediating between these competing interests has, until recently, been left largely to judicial lawmaking and not to legislation. 'Courts were required, in the absence of legislation, to determine what the public welfare demanded; — whether it would not be best subserved by leaving the contestants free to resort to any means not involving a breach of the peace or injury to tangible property; whether it was consistent with the public interest that the contestants should be permitted to

> invoke the aid of others not directly interested in the matter in controversy; and to what extent incidental injury to persons not parties to the controversy should be held justifiable.' "

Under the facts and the law, the Alabama Court found petitioners to have violated its valid policy. While certainly this Court will review the trial transcript, the orders and opinions of the State Court, we submit that the trial Court was correct in enjoining petitioners. We further submit that the Supreme Court of Alabama was correct in affirming the lower Court, and that its opinion should come to this Court for review "bearing a weighty title of respect" that it is due, *Hanke, supra,* p.475.

CONCLUSION

THE ALABAMA COURTS HAD JURISDICTION TO DETERMINE THAT PETITIONERS VIOLATED ITS VALID STATE POLICY, AND ITS OPINIONS SHOULD, IN ALL RESPECTS, BE AFFIRMED. PETITIONERS' PROPER FORUM IS THE U.S. CONGRESS.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, Alex F. Lankford, III, attorney for respondent Robert E. Malone, do hereby certify that on this the ____ day of August, 1974, three copies of the foregoing brief on Writ of Certiorari have been served on each of the following attorneys of record:

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